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INTERNATIONAL CHILD LABOR REGULATION 101: WHAT CORPORATIONS NEED TO KNOW ABOUT TREATIES PERTAINING TO WORKING YOUTH

INTRODUCTION

The decision in *Roe v. Bridgestone Corp.*¹ has signaled that transnational corporations² (“TNCs”) that have sufficient minimum contacts with the United States³ may be subject to liability in U.S. courts for international child labor violations committed abroad. This liability may arise under the Alien Tort Statute⁴ (“ATS”), which allows aliens to bring claims in U.S. courts for torts in violation of an international treaty or the law of nations.⁵ In *Bridgestone*, Liberian workers alleged⁶ that their corporate employer⁷ at the Firestone rubber plantation near Harbel, Liberia,⁸ encouraged or even required them to put their children to work in order to meet extremely high production quotas.⁹ At the plantation, children as young as six years old allegedly tapped raw latex from rubber trees, ap-

1. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

2. As used in this Note, “transnational corporation” means a business entity that operates in at least two countries. Seventy-eight thousand TNCs and their 780,000 foreign affiliates account for one-third of world exports and the equivalent of ten percent of the world’s gross domestic product. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2007: TRANSNATIONAL CORPORATIONS, EXTRACTIVE INDUSTRIES AND DEVELOPMENT, at xvi, U.N.Doc. UNCTAD/WIR/2007, U.N. Sales No. E.07.II.D.9 (2007).

3. *See WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that the forum state may not exercise *in personam* jurisdiction over a defendant that did not establish minimum contacts with the state).

4. Alien Tort Statute, 28 U.S.C. § 1350 (2000).

5. *Id.*

6. The plaintiffs asserted claims under the ATS, Thirteenth Amendment, California law, and 18 U.S.C. § 1595 (a federal statute authorizing civil actions for criminal forced labor violations), but these claims were dismissed. *Bridgestone Corp.*, 492 F.Supp. 2d at 1024.

7. Bridgestone Corporation is headquartered in Japan and, along with its consolidated subsidiaries, is the world’s largest manufacturer of tires and rubber products. BRIDGESTONE GROUP, 2007 ANNUAL REPORT 1, 79 (2008).

8. Harbel, Margibi County is situated about thirty-seven miles from Monrovia, the capital of Liberia. U.N. MISSION IN LIBERIA, HUMAN RIGHTS IN LIBERIA’S RUBBER PLANTATIONS: TAPPING INTO THE FUTURE 20, 72–73 (2006).

9. According to the pleadings, workers at the Firestone plantation cut rubber trees with a machete to allow the raw latex to drip into cups mounted on the trees, collected the latex from the cups into buckets, and brought the latex to the collection location carrying two, seventy-five-pound buckets at a time. To earn a daily wage equivalent to \$3.19, a worker must collect latex from 1125 trees. *Bridgestone Corp.*, 492 F.Supp. 2d at 991, 994.

plied pesticides to the trees without any protective equipment, and performed other “back-breaking” work.¹⁰ The employer moved to dismiss for failure to state a claim, but the court denied the motion and concluded that these allegations, if proven, may give rise to a violation of international law.¹¹ As the *Bridgestone* litigation continues, TNCs are confronted with the need to identify international child labor standards so as to avoid liability.

In addition to the risk of liability, failure of TNCs or TNCs’ suppliers to comply with international child labor standards may pose reputational risks. An incident involving Gap Inc., an international apparel, accessories, and personal care products retailer,¹² illustrates this point. In October of 2007, in an article entitled “Child Sweatshop Shame Threatens Gap’s Ethical Image,” the U.K. newspaper, *The Observer*, reported that Gap Inc. had received merchandise from a factory in India where children as young as ten years old worked sixteen hours a day without pay.¹³ In response, Gap Inc. issued a press release stating that Gap Inc. discontinued the work order placed with that factory.¹⁴ The press release, however, was silent on the future fate of child laborers and whether they in fact continued working at that factory after Gap Inc. discovered the violations.¹⁵ This raises the question of how TNCs should respond to child labor incidents to assure compliance with international law.

This Note analyzes the treaty law pertaining to the child labor issues involved in the *Bridgestone* litigation and the Gap Inc. incident. To be clear, long before *Bridgestone*, businesses that conducted activities in a foreign jurisdiction could be subject to liability under that jurisdiction’s *domestic* laws.¹⁶ This Note examines child labor standards imposed by

10. *Id.* at 988, 991, 994, 1019, 1021.

11. *Id.* at 1021.

12. Gap Inc., Company Fact Sheet, http://www.gapinc.com/public/About/abt_fact_sheet.shtml (last visited Oct. 23, 2008).

13. Dan McDougall, *Child Sweatshop Shame Threatens Gap’s Ethical Image*, *OBSERVER*, Oct. 28, 2007, available at <http://observer.guardian.co.uk/world/story/0,,2200573,00.html>.

14. Press Release, Gap Inc., Gap Inc. Issues Statement on Media Reports on Child Labor (Oct. 28, 2007).

15. *See id.*

16. *Compare* Chadwick v. Arabian Am. Oil Co., 656 F. Supp. 857 (D. Del. 1987) (applying Saudi Arabian law to the issues of vicarious liability, existence of an employer-employee relationship, and the validity of third-party claims that arose in Saudi Arabia), with *RCA OMS, Inc.*, 202 N.L.R.B. 228 (1973) (finding that the National Labor Relations Act, 29 U.S.C. § 151–69, including the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, does not extend extraterritorially to a U.S. employer in Greenland, despite the fact that the employees were hired in the United States, underwent U.S. security clearance, were paid from the United States, and returned to the United States upon

international law, which historically has been shaped by¹⁷ treaties,¹⁸ customary international law,¹⁹ and the general principles of law.²⁰ In recent years, “a mushrooming of international norms and institutions”²¹ has embraced other categories, such as peremptory norms²² and “soft law.”²³ While various sources of international law may relate to the problem of international child labor,²⁴ this Note focuses on treaties and conventions,

finishing the job). *See also* Felice Morgenstern & Blaise Knapp, *Multinational Enterprises and the Extraterritorial Application of Labour Law*, 27 INT’L & COMP. L. Q. 769 (1978) (discussing extraterritorial application of domestic labor law).

17. *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, T.S. No. 993 [hereinafter ICJ Statute].

18. A treaty is “an international agreement concluded between States in written form and governed by international law.” Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

19. Customary international law is “evidence of a general practice accepted as law.” ICJ Statute, *supra* note 18, art. 38(1)(b). *See also* ANTONIO CASSESE, INTERNATIONAL LAW 153, 156 (2d ed. 2005) (discussing customary international law).

20. The general principles of law “emanate from principles endorsed by the developed domestic legal systems of different [S]tates.” G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 177 (1993). An example of the general principles of law is the principle of good faith. BING CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105–58 (1987).

21. Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 410 (2007).

22. A *jus cogens*, or a peremptory, norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, *supra* note 18, art. 53. The prohibition on genocide is an example of a *jus cogens* norm. CASSESE, *supra* note 19, at 155, 199–212; THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 392–98 (2006).

23. The term “soft law” refers to sources of law other than treaties and custom, for example, instruments generated by international bodies, nongovernmental organizations, and TNCs. Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L L. 381, 385 (1998); Levit, *supra* note 21, at 413–12.

24. *See, e.g.*, Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007) (assessing the role of TNCs in developing international standards of corporate behavior); Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT’L L. 139 (2001) (analyzing child labor standards as a matter of international customary law); A.C.L. Davies, *Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States*, in LABOUR RIGHTS AS HUMAN RIGHTS 177 (Philip Alston ed., 2005) (discussing the role of the supranational legislature in the European Union in establishing labor standards).

which, at least until recently, have represented the strongest form of international legal obligations.²⁵

This Note argues that child labor, as a problem of social and economic development, requires TNCs to act proactively. Often, after exposure in the media for its association with a supplier that uses child labor, a U.S. or other Western company will impulsively discontinue its relationship with the supplier or require that child laborers be dismissed from the supplier's production.²⁶ This reactive approach does not squarely address the issues that child labor raises and may be inconsistent with the principles of children's human rights. Where a TNC detects incidents of child labor, the TNC should focus on creating meaningful alternatives for children dismissed from work.

This Note proceeds in five parts. Part I examines the phenomenon of child labor and the role of domestic and international law in child labor regulation. Part II analyzes the child labor standards adopted by the International Labour Organization ("ILO"),²⁷ including the Worst Forms of Child Labor Convention.²⁸ Part III discusses the human rights of economically active children, as codified in the Convention on the Rights of the Child.²⁹ Part IV addresses the significance of child labor standards set forth in U.S. free trade agreements ("FTAs"). Part V concludes the analysis and provides recommendations and planning considerations for the implementation of international child labor standards in TNCs' corporate compliance programs.

I. CHILD LABOR AS AN INTERNATIONAL CONCERN

Today one in seven children in the world works.³⁰ The term "child" generally refers to a person under the age of eighteen,³¹ and the "eco-

25. JAMES AVERY JOYCE, *WORLD LABOUR RIGHTS AND THEIR PROTECTION* 21 (1980).

26. See John Schmid, *Guatemalan Kohl's Apparel-Maker Signs Labor Pledge*, MILWAUKEE J. SENTINEL, July 2, 2007, available at <http://www.nlcnet.org/article.php?id=412> (quoting Charles Kernaghan of the National Labor Committee, a U.S. nongovernmental organization, who has pointed out that when a U.S. company, in order to avoid the association with a sweatshop, withdraws its orders, "the workers [at the sweatshop] get doubly punished").

27. The ILO is a specialized agency of the United Nations responsible for social and labor issues, such as the right to work and social security. JOYCE, *supra* note 25, at 29; N. VALTICOS, *INTERNATIONAL LABOUR LAW* 19 (1979).

28. ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, June 17, 1999, S. TREATY DOC. NO. 106-5 (1999), 2133 U.N.T.S.161 [hereinafter *Worst Forms of Child Labor Convention*].

29. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

30. Seven out of ten working children harvest crops and tend livestock in agriculture. Twenty-two percent of working children are in the services sector, where some of them

conomic activities” of children are understood to encompass various productive functions, paid and unpaid, formal and informal, legal and illegal.³² In this context, as the *Bridgestone* court has pointed out, “national and international norms accommodate a host of different situations” where children’s work is acceptable.³³ This raises the issue of defining prohibited activities encompassed by the term “child labor.”

A. Defining “Child Labor”

Children’s economic activities exist within a continuum. On one end of the continuum are various exploitative forms of labor, such as the bonded labor allegedly involved in the Gap Inc. incident.³⁴ Bonded labor, common in South Asia, arises when an indebted family puts their children to work to pay off the debt.³⁵ As bonded children work for nominal wages and the creditor typically retains the major part of the wages as interest,³⁶ which may be as high as sixty percent, the bondage status may pass to the next generation.³⁷ On the other end of the continuum are activities of children who were fortunate to become apprentices in trades, which is

are informally employed as domestic workers who prepare meals, wash dishes, or care for little children. Nine percent are in the industry sector, which includes construction, manufacturing, and mining. Human Rights Watch, *Child Domestic: The World of Invisible Workers* (2004), <http://hrw.org/english/docs/2004/06/10/africa8789.htm> [hereinafter *Child Domestic*]; Int’l Labour Org. [ILO], *Facts on Child Labour 2006* (2006), available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=2899>; ILO, *World Day Against Child Labour* (2007), available at <http://www.ilo.org/ipecinfo/product/viewProduct.do?productId=4048>.

31. Worst Forms of Child Labor Convention, *supra* note 28, art. 2; Convention on the Rights of the Child, *supra* note 29, art. 1 (providing that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”).

32. The term “economic activity” “encompasses most productive activities undertaken by children, whether for the market or not, paid or unpaid, for a few hours or full time, on a causal or regular basis, legal or illegal; it excludes chores undertaken in the child’s own household or schooling.” ILO, International Labour Conference, May 31–June 16, 2006, Report of the Director-General, *The End of Child Labour: Within Reach, Global Report Under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 6, Rep. I(B), available at <http://www.ilo.org/public/english/standards/realm/ilc/ilc95/pdf/rep-i-b.pdf> [hereinafter ILO, *The End of Child Labour*].

33. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1020 (S.D. Ind. 2007).

34. McDougall, *supra* note 13.

35. A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT’L L. REV. 818, 820–24 (2005).

36. WORLD VISION UK, OFFERING HOPE, NOT DESPAIR: ERADICATING CHILD LABOUR WITHOUT PUTTING CHILDREN WORKERS ON THE STREETS 17 (1997).

37. Rassam, *supra* note 35, at 821.

sometimes the only realistic way to learn vocational skills in some countries.³⁸ In India, for example, children in families of artisans, craftsmen, and farmers traditionally join their family trade and learn while working alongside the family members.³⁹ The question then becomes what factors can distinguish “child labor” from other economic activities of children.

In order to answer this question, it is helpful to identify the concerns that child labor raises and the policies underlying the child labor prohibition. One concern is the children’s health and well-being. For example, in Bangladesh alone, fifty child laborers are injured by machinery daily, and three of those fifty become permanently disabled.⁴⁰ Another concern is the exploitation of children, as in Guatemala and El Salvador, where tens of thousands of domestic servants as young as eight years of age work ninety-hour weeks.⁴¹ Working children are also often deprived of educational opportunities, for example, in rural areas in Mexicali Valley, Mexico, where child labor is common and school attendance during the harvesting season drops significantly.⁴² Entering the workforce too early reduces the children’s future earnings by thirteen to twenty percent⁴³ and hardly benefits the domestic economy because children are generally less productive than adults.⁴⁴ Ultimately, the child labor prohibition aims to

38. Michael Bonnet, *Child Labour in Africa*, 132 INT’L LAB. REV. 371, 385–87 (1993).

39. Shahana Dasgupta, *Child Welfare Legislation in India: Will Indian Children Benefit from the United Nations Convention on the Rights of the Child*, 11 MICH. J. INT’L L. 1301, 1308 (1990).

40. ILO, *World Day Against Child Labour*, *supra* note 30. In developing countries, the rate of injury and illness of working children ranges from twelve percent (for boys in agriculture) to thirty-five percent (for girls in construction). ILO, *Child Labour in Africa* (2005), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=child>.

41. *Child Domestic*, *supra* note 30.

42. DAVID BACON, *THE CHILDREN OF NAFTA: LABOR WARS ON THE U.S./MEXICO BORDER* 33 (2004).

43. ILO, *The End of Child Labour*, *supra* note 32, at 24.

44. Employers in certain industries attempt to justify child labor under the “nimble fingers” theory, which holds that children are more productive than adults in carrying out certain tasks, such as manual tasks that require dexterity. This theory, however, would not be defensible “were it not for the fact that child labor is much cheaper, more subservient, and therefore better exploited by employers.” M. Neil Browne et al., *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws*, 27 Hous. J. INT’L L. 1, 28–29 (2004). See also Savitri Goonesekere, *The Best Interests of the Child: A South Asian Perspective*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 117, 143 (Philip Alston ed., 1994) (discussing *Mehta v. State of Tamil Nadu*, a 1990 decision of the Supreme Court of India, which held that the need for children’s work in the matches industry in Sivakasi outweighed the concern for

eliminate practices that impede children's development and education.⁴⁵ As a matter of social policy, the child labor prohibition ensures the development of human capital and, consequently, long-term social and economic growth.⁴⁶

The prohibition of child labor, however, does not discourage children from contributing to the family's budget, learning vocational skills and participating in communal life through their economic activities.⁴⁷ Daily, some 30,000 children worldwide die as a result of extreme poverty,⁴⁸ and thus, children's economic activities may be essential to their survival. A factory in Kutsia, Bangladesh, for instance, dismissed orphans who were too young to work.⁴⁹ These children eventually attempted to return to the factory by bribing the supervisors or by staying on after bringing lunch to their elder siblings because it was the children's only opportunity to earn a living.⁵⁰ In addition, through their productive activities, children integrate into the community, as in Africa, where children as young as ten years old begin imitating their family members in the household and farm tasks, and then move to other tasks, including serving the elders in their community.⁵¹ As such, notions about the appropriateness of children's economic activities vary among countries.

their well-being since "tender hands of children are more suited to the sorting out of the manufactured product, and processing it for purposes of packing").

45. See Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21 ARIZ. J. INT'L & COMP. L. 665, 676 (2004) (discussing the effects of child labor on children's schooling and vocational training). See also Beatrice Adenike Oloko, *Children's Work in Urban Nigeria: A Case Study of Young Lagos Street Traders*, in PROTECTING WORKING CHILDREN 13–21 (William E. Myers ed., 1991) (discussing the impact of children's involvement in street trading on their academic achievement).

46. Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 246–47 (2004).

47. See Breen Creighton, *Combating Child Labour: The Role of International Labour Standards*, 18 COMP. LAB. L.J. 362, 363 (1997) (providing examples of children's work that is not abusive or exploitative); ILO, *World Day Against Child Labour*, *supra* note 30 (discussing child labor in agriculture and pointing out that not all work negatively affects children).

48. ILO, *The End of Child Labour*, *supra* note 32, at 1.

49. JEREMY SEABROOK, CHILDREN OF OTHER WORLDS: EXPLOITATION IN THE GLOBAL MARKET 23 (2001).

50. *Id.*

51. Bonnet, *supra* note 38, at 377. See also B. Rwezaura, *The Concept of the Child's Best Interest in the Changing Economic and Social Context of Sub-Saharan Africa*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS, *supra* note 44, at 82, 89–92 (discussing economic activities of children in Sub-Saharan Africa).

B. The Role of Domestic Law in Regulating Child Labor

Child labor laws originally developed in domestic legal systems⁵² and reflected domestic ideology, economy, and culture. In the United States, for example, the 1938 Fair Labor Standards Act was adopted after the *Lochner*⁵³ era of free labor ideology⁵⁴ and left the entire agricultural sector unregulated.⁵⁵ Today, this federal statute⁵⁶ outlaws only “oppressive”⁵⁷ child labor and, generally, sets fourteen as the minimum age for nonagricultural work, but exempts from regulation children’s work at family-owned businesses and farms, as performers and babysitters, and in certain other settings.⁵⁸ In India, in turn, where child labor is common,⁵⁹ the 1986 Child Labour (Prohibition and Regulation) Act restricts employment of children under fourteen only in specific occupations and

52. Rajani Kanta Das, *Child Labour in India I*, 28 INT’L LAB. REV. 796, 811, 814 (1933).

53. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York statute that limited work hours for bakers as violating the rights to property and contractual autonomy implicated in the due process clause of the Fourteenth Amendment of the U.S. Constitution). *Cf. W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding the constitutional validity of the minimum wage law of the State of Washington).

54. Horacio Spector, *Philosophical Foundations of Labor Law*, 33 FLA. ST. U. L. REV. 1119, 1122 (2006).

55. HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 85 (2002).

56. Individual States within the United States may promulgate more protective child labor laws. *See* U.S. Dep’t of Labor Employment Standards Admin., *State Labor Laws*, <http://www.dol.gov/esa/whd/state/state.htm> (last visited Oct. 3, 2008) (summarizing labor laws in individual U.S. States).

57. The Fair Labor Standards Act, 29 U.S.C. § 203(l) (2006), defines “oppressive child labor” as follows:

[A] condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age.

58. *Id.* §§ 203, 212, 213(c)–(d), 214.

59. AMARTYA KUMAR SEN, *DEVELOPMENT AS FREEDOM* 114 (2000).

processes, including tasks characteristic of the South Asian economy such as the making of *beedi* (hand-rolled local cigarettes),⁶⁰ carpet-weaving,⁶¹ and, as of 2006, working in *dhabas* (road-side eateries) and tea-shops.⁶² These examples demonstrate that individual governments can tailor their domestic child labor laws to fit into their specific economic and social policies.

Domestic child labor regulation may also respond to unique changes occurring in a particular jurisdiction. In Russia, for instance, the 1990s jump from a centrally planned economy to the free-market “gangster capitalism”⁶³ has led to a demographic crisis, which has resulted in a 750,000–800,000 annual population drop⁶⁴ and the emergence of “street children”—homeless and orphaned children living in the streets.⁶⁵ The 2001 Russian Labor Code addresses this crisis by prohibiting employment of children under sixteen⁶⁶ and affirmatively guarantying thirty-one

60. *Beedi* are also known as *bidi* or *biri*. Manas Bhattacharya et al., *Making Ends Meet: Bidi Workers in India Today, A Study of Four States* 1–2, 78 (Int’l Labour Org., Sectoral Activities Programme, Working Paper, provisional ed., 2003), available at <http://www.ilo.org/public/english/dialogue/sector/papers/food/wp202.pdf>. See SEABROOK, *supra* note 49, at 23, 65 (discussing *bidi*).

61. Child Labour (Prohibition and Regulation) Act, Act No. 61 (1986) (India), available at <http://labour.gov.in/cwl/ChildLabour.htm> (click on the “Child Labour (Prohibition & Regulation) Act” hyperlink). The Constitution of India provides that “no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.” INDIA CONST. art. 24. See also Dasgupta, *supra* note 39, at 1304–07 (examining the laws of India pertaining to child labor).

62. Ministry of Labour and Employment, Notification, The Gazette of India, Oct. 10, 2006, Extraordinary, No. 1211, 2, pt II, sec.3(ii), S.O. 1742(E), available at <http://labour.nic.in/cwl/clBanningFinalOrder.pdf>.

63. GEORGE TSOOGAS, LABOR REGULATION IN A GLOBAL ECONOMY 6 (2001).

64. This decrease is a result of a misbalance between the population birth and death rates. This problem is sometimes referred to as the “lost generation of the 1990s.” A.G. GLISKOV ET AL., PRAVA I OBJAZANNOSTI NESOVERŠENNOLETNIH (KOMMENTARIJ K ZAKONODATEL’STVU O PRAVAH NESOVERŠENNOLETNIH I ZAŠČITE ETIH PRAV) [RIGHTS AND DUTIES OF MINORS (COMMENTARY ON THE LEGISLATURE ON THE RIGHTS OF MINORS AND PROTECTION THEREOF)] 8–9 (2007).

65. U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, U.S. DEPARTMENT OF LABOR’S 2006 FINDINGS ON THE WORST FORMS OF CHILD LABOR 389–90 (2007).

66. Three exceptions to this rule are (1) employment of a child fifteen years or older who has graduated from or left in accordance with the federal law a basic general (secondary) educational establishment, (2) light work of a fourteen-year-old, not harmful to the child’s health and education process, with the consent of one parent (guardian or custodian) and the patronage body, outside of school hours, and (3) participation in the creation and/or performance of art works, without any harm to the child’s health and moral development, in movie, theatre, concert and circus organizations, with the consent of one parent (guardian or custodian) and the patronage body. Trudovoi Kodeks [TK] [Labor Code] art. 63 (Russ.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/>

days of paid vacation to workers under eighteen⁶⁷ and an annual medical examination at the employer's expense.⁶⁸ The City of Moscow responded on the local government level by mandating employers with more than a hundred employees to set a four percent minimum quota for orphans under twenty-three, adolescents under eighteen, and the disabled.⁶⁹ As individual States and local governments may seem better positioned in designing specific policies with respect to child labor, it is important to address why child labor is also regulated internationally.

C. Regulating Child Labor on the International Level

Parallel with the development of domestic child labor laws, the idea of international regulation of child labor emerged, and it was supported by regulatory, economic, and humanitarian arguments.⁷⁰ Less labor regulation in one country may be a factor in attracting employers from other parts of the world,⁷¹ which, consequently, disadvantages workers in countries with tougher labor laws, such as developed countries.⁷² Labor regulation on the international level curbs such attempts to gain a competitive edge by sacrificing labor protections.⁷³ As for the economic aspect of international child labor regulation, poverty is a significant cause

65252/E01RUS01.htm; O.B. SMIRNOV ET AL., KOMMENTARIJ K TRUDOVOMU KODEKSU ROSSIJ-SKOJ FEDERACII [COMMENTARY ON THE LABOR CODE OF THE RUSSIAN FEDERATION] 160–61 (2007).

67. Trudovoi Kodeks [TK] [Labor Code], *supra* note 66, art. 267 (“Employees under [eighteen] years old are granted an annual paid leave of [thirty-one] calendar days at any time convenient to them.”).

68. *Id.* art. 266 (“Persons under [eighteen] years old are to be employed only after preliminary medical survey and are to pass an annual medical survey up to when they reach [eighteen] years old. The medical surveys specified in the present Article are paid at the expense of the employer.”).

69. GLISKOV ET AL., *supra* note 64, at 451; N. N. ŠEPULINA, NOVOE ZAKONODATEL'STVO OB OHRANE TRUDA [THE NEW LEGISLATURE ON LABOR PROTECTION] 172 (2007).

70. VALTICOS, *supra* note 27, at 17–18.

71. Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 MICH. J. INT'L L. 39, 41 (2004); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L. J. 203, 206–07 (2007).

72. See TSOĞAS, *supra* note 63, at 19, 35–36; Cleopatra Doumbia-Henry & Eric Gravel, *Free Trade Agreements and Labour Rights: Recent Developments*, 145 INT'L LAB. REV. 185, 189 (2006) (discussing the concern about a “protectionist backlash from the developed countries” in enforcement of labor rights through trade agreements).

73. Doumbia-Henry & Gravel, *supra* note 72, at 189; Kolben, *supra* note 71, at 206–07.

and, at the same time, a consequence of child labor.⁷⁴ In developing countries, where child labor is prevalent,⁷⁵ this creates a vicious cycle, and so international regulation of child labor may help to break this cycle.⁷⁶ Moreover, labor rights (which in the United States are often referred to as “workers’ rights”)⁷⁷ involve human rights,⁷⁸ such as the right to be free from exploitation.⁷⁹ These arguments have prompted the gradual development of international child labor regulation, as reflected in the conventions of the ILO.

II. CHILD LABOR STANDARDS IN THE ILO CONVENTIONS

The ILO is an international body that develops labor standards through adoption of conventions and recommendations⁸⁰ and engages govern-

74. Browne et al., *supra* note 44, at 26–27. *See also* Worst Forms of Child Labor Convention, *supra* note 28, pmb1. (stating that “child labor is to a great extent caused by poverty”).

75. Agarwal, *supra* note 45, at 665. Sub-Saharan Africa has the highest percentage of economically active children (twenty-six percent), followed by the Asian-Pacific region (less than twenty percent), and Latin America and the Caribbean (five percent). ILO, *Facts on Child Labour 2006*, *supra* note 30.

76. Kaushik Basu & Pham Hoang Van, *The Economics of Child Labor*, 88 AM. ECON. REV. 412, 413 (1998).

77. Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration of Fundamental Principles and Rights at Work?* 36 N.Y.U. J. INT’L L. & POL. 221, 224 (2004).

78. The International Covenant on Civil and Political Rights prohibits all forms of slavery and “forced or compulsory labour” and affirms the rights to unionize and to be free from discrimination. International Covenant on Civil and Political Rights arts. 8, 22, 26, Dec. 19, 1966, 999 U.N.T.S. 171. The International Covenant on Economic, Social and Cultural Rights provides for the right to be free from discrimination, the “right to work,” the right “to the enjoyment of just and favourable conditions of work,” the right to unionize, and the right to social security. International Covenant on Economic, Social and Cultural Rights arts. 2(2), 6–9, Dec. 16, 1966, 993 U.N.T.S. 3. The Universal Declaration of Human Rights affirms the equality of “all human beings,” prohibits all forms of slavery, and provides for the “right to work,” “free choice of employment,” “just and favourable conditions of work,” “protection against unemployment,” “equal pay for equal work,” “just and favorable remuneration,” the right to unionize, and “the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.” Universal Declaration of Human Rights, G.A. Res. 217A(III), at 72–73, 75, U.N. GAOR, 3d Sess., 183d plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). *See also* Philip Alston, *Labour Rights as Human Rights: The Not So Happy State of the Art*, in LABOUR RIGHTS AS HUMAN RIGHTS, *supra* note 24, at 1, 2–5 (discussing labor rights as human rights).

79. Universal Declaration of Human Rights, *supra* note 78, at 72.

80. The ILO conventions have the force of treaties and bind the States that ratify such conventions. The ILO recommendations are nonbinding policy guidelines. JOYCE, *supra* note 25, at 26; TSOOGAS, *supra* note 63, at 43–44.

ments, employers, and workers in the standard-setting process in a model known as the “tripartite structure.”⁸¹ Prior to 1973, the ILO generated standards for individual economic sectors, such as industry or agriculture,⁸² and focused on “child welfare”⁸³ rather than child labor abolition. The 1973 Minimum Age Convention No. 138,⁸⁴ which is currently in force,⁸⁵ was the first “umbrella”⁸⁶ convention that covered all economic sectors⁸⁷ and identified the goal of child labor abolition.⁸⁸ The United States has not ratified this Convention.⁸⁹ The Convention, however, provides a framework for analyzing the 1999 Worst Forms of Child Labor Convention, which the United States has ratified.⁹⁰

81. Constitution of the International Labour Organisation art. 7, Oct. 9, 1946, 62 Stat. 3485, 15 U.N.T.S. 35; JOYCE, *supra* note 25, at 32–35. As of October 5, 2008, 182 countries are ILO members. Int'l Labour Org., Alphabetical List of ILO Member Countries (182 Countries), <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited Oct. 5, 2008).

82. *See, e.g.*, ILO Convention (No. 59) Fixing the Minimum Age for Admission of Children to Industrial Employment, June 22, 1937, 40 U.N.T.S. 217; ILO Convention (No. 10) Concerning the Age for Admission of Children to Employment in Agriculture, Nov. 16, 1921, 38 U.N.T.S. 143; ILO Convention (No. 6) Concerning the Night Work of Young Persons Employed in Industry, Nov. 28, 1919, 38 U.N.T.S. 93; ILO Convention (No. 5) Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, 38 L.N.T.S. 81.

83. Constitution of the International Labour Organisation, *supra* note 81, Annex, III(h).

84. ILO Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 26, 1973, 1015 U.N.T.S. 297 [hereinafter Minimum Age Convention].

85. ILOLEX Database of Int'l Labour Standards, Ratifications by Country or by Convention, <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Aug. 29, 2008).

86. Int'l Labour Conf., 90th Sess., *A Future Without Child Labor, Global Report under the Follow-up to the ILO Declaration of Fundamental Principles and Rights at Work*, rpt. I(B), 2 (2000), available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1566 [hereinafter ILC, *A Future Without Child Labor*].

87. Minimum Age Convention, *supra* note 84, pmbl., art. 1.

88. *Id.* pmbl., art. 10.

89. ILOLEX Database of Int'l Labour Standards, *supra* note 85.

90. Worst Forms of Child Labor Convention, *supra* note 28. The United States has ratified two ILO Conventions: the 1957 Forced Labor Convention and the 1999 Worst Forms of Child Labor Convention. The standards of the former, as applied to the employment of youth, overlap with those of the latter. Compare ILO Convention (No. 105) Concerning the Abolition of Forced Labor, June 25, 1957, S. TREATY DOC. NO. 88-11 (1963), S. TREATY DOC. NO. 102-3 (1991), 320 U.N.T.S. 291, with Worst Forms of Child Labor Convention, *supra* note 28, pmbl. (stating that “some of the worst forms of child labour are covered by other international instruments, in particular the Forced Labour Convention, 1930”). ILOLEX Database of Int'l Labour Standards, *supra* note 85.

A. The Framework of the Minimum Age Convention No. 138

The 1973 Minimum Age Convention No. 138 distinguishes child labor from other economic activities of children based on the child's age and the work setting. Children under eighteen years old⁹¹ generally may not engage in work "which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons."⁹² As Recommendation No. 146 accompanying the Convention provides, the determination regarding the types of work to which this limitation will apply should take into consideration relevant international standards, such as those pertaining to the use of dangerous substances and processes.⁹³ In contrast, States may permit adolescents between thirteen and fifteen years of age to perform "light work,"⁹⁴ defined as work that is "not likely to be harmful to their health or development"⁹⁵ and does not prejudice children's education or vocational training.⁹⁶ This correlation between the child's age and the type of work created a new framework for defining child labor across economic sectors.

Despite this progress in defining child labor, the Convention failed to attract a sufficient number of ratifications at the time of its adoption, especially among the States where child labor was common, such as India, Indonesia, and Pakistan.⁹⁷ Developing countries, contending with "ex-

91. Under the Minimum Age Convention, States may, however, upon consultation with the concerned organizations of employers and workers, authorize employment or work of persons from the age of sixteen, "on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity." Minimum Age Convention, *supra* note 84, art. 3(3).

92. *Id.* art. 3(1).

93. ILO Minimum Age Recommendation (No. 146) art. 10(1), June 26, 1973, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R146>.

94. Minimum Age Convention, *supra* note 84, art. 7(1).

95. *Id.* art. 7(1)(a).

96. *Id.* art. 7(1)(b).

97. By 1996, out of 173 ILO members, only forty-nine ratified the Minimum Age Convention. David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 945 (2000). Indonesia and Pakistan ratified the Convention in 1999 and 2006, respectively. To date, 150 States have ratified the Convention, excluding India, Liberia, and the United States. ILOLEX Database of Int'l Labour Standards, *supra* note 85. Approximately only a quarter of all ILO members ratified other ILO instruments protecting working children, such as conventions requiring employers to conduct annual medical examinations of children-employees. *Id.* See, e.g., ILO Convention (No. 124) Concerning Medical Examination of Young Persons for Fitness for Employment Underground in Mines, June 23, 1965, 614 U.N.T.S. 239; ILO Convention (No. 78) Concerning Medical Examination of Children and Young Persons for Fitness for Employment in Non-Industrial Occupations, Oct. 9, 1946, 78 U.N.T.S. 213.

plusive population growth, endemic poverty, and lack of adequate infrastructure,"⁹⁸ found the Convention insufficiently flexible, despite its "flexibility clauses,"⁹⁹ because the Convention failed to identify the immediate priorities and a methodology for achieving the goal of child labor abolition.¹⁰⁰ As for developed countries, the Convention's presumption that the work of children under thirteen is impermissible under any circumstances contradicted the preference of such countries to leave the part-time work of youth, such as morning newspaper delivery by a twelve-year-old, in the realm of parental control and public opinion rather than regulation by law.¹⁰¹ Thus, the Minimum Age Convention No. 138 provided a new framework for analyzing child labor, but failed to achieve international consensus on the issue.

B. The Worst Forms of Child Labor Convention: Reaching a Consensus

In the 1990s, the ILO undertook a "strategic shift"¹⁰² in its policy on child labor and identified the elimination of the worst forms of child labor as a priority. The ILO moved from traditional labor issues, such as the regulation of work conditions, to criminal law areas, such as child trafficking and the economic exploitation of children through prostitution and military recruitment.¹⁰³ This approach culminated in the 1999 Worst Forms of Child Labor Convention, a product of the realization that immediate steps needed to be taken to abolish intolerable forms of child labor.¹⁰⁴ One hundred and sixty-five countries, including the United States, have ratified this Convention.¹⁰⁵

98. Creighton, *supra* note 47, at 388.

99. *Id.* at 391. Under the Minimum Age Convention, in certain circumstances, States may exclude limited categories of work from the application of the Convention, and developing countries, in particular, may set the minimum age at fourteen years. In addition, the Convention does not apply to certain types of work performed as part of children's education or training. Minimum Age Convention, *supra* note 84, art. 2(4), 4, 5(3), 6.

100. Creighton, *supra* note 47, at 390–92.

101. *Id.* 386–88.

102. Smolin, *supra* note 97, at 942.

103. See Worst Forms of Child Labor Convention, *supra* note 28, pmbl., art. 3(a)–(c) (recognizing "the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour," such as trafficking and forced or compulsory military recruitment of children).

104. Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AM. J. INT'L L. 943, 943 (1999); Yoshie Noguchi, *ILO Convention No. 182 on the Worst Forms of Child Labour and the Convention on the Rights of the Child*, 10 INT'L J. CHILD. RTS. 355, 355 (2002).

105. ILOLEX Database of Int'l Labour Standards, *supra* note 85.

The Convention applies to all persons under eighteen years of age¹⁰⁶ and focuses on the abolition of two categories of child labor: the “unconditional worst forms of child labor” and “hazardous work.”¹⁰⁷ The unconditional worst forms of child labor include “all forms of slavery or practices similar to slavery,” debt bondage, and the use of children in various illicit activities.¹⁰⁸ These forms of labor are prohibited unconditionally because improving their conditions would not justify such practices.¹⁰⁹ Similarly to the Minimum Age Convention No. 138, hazardous work encompasses “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”¹¹⁰ The Worst Forms of Child Labor Convention refers to¹¹¹ a list of considerations for identifying “hazardous work” as set forth in ILO Recommendation No. 190.¹¹² These considerations include, without limitation, exposure to dangerous machinery and substances damaging to health.¹¹³ Because of its focus on the intolerable forms of child labor, the

106. Worst Forms of Child Labor Convention, *supra* note 28, art. 2.

107. The ILO Worst Forms of Child Labour Recommendation refers to the forms of child labor prohibited under Article 3(d) of the Convention as “hazardous work.” ILO Worst Forms of Child Labour Recommendation (No. 190) art. 3, June 17, 1999, *available at* <http://www.unhcr.org/home/RSDLEGAL/3ddb6ef34.pdf>. Commentators use the term “unconditional forms worst forms of child labor” to refer to the practices identified in Article 3(a)–(c) of the Convention. *See, e.g.*, Noguchi, *supra* note 104, at 358.

108. The unconditional forms of child labor comprise the following:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties.

Worst Forms of Child Labor Convention, *supra* note 28, art. 3(a)–(c).

109. Noguchi, *supra* note 104, at 358.

110. The Worst Forms of Child Labor Convention replaced the word “jeopardize” in the definition of “hazardous work” in the Minimum Age Convention with the word “harm”: “work which, by its nature or the circumstances in which it is carried out, is likely to *harm* the health, safety or morals of children.” *Compare* Worst Forms of Child Labor Convention, *supra* note 28, art. 3(d) (emphasis added), *with* Minimum Age Convention, *supra* note 84, art. 3(1).

111. Worst Forms of Child Labor Convention, *supra* note 28, art. 4(1).

112. ILO Worst Forms of Child Labour Recommendation (No. 190), *supra* note 110, art. 3.

113. Other relevant considerations are “work which exposes children to physical, psychological or sexual abuse”; “work underground, under water, at dangerous heights or in confined spaces”; “work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads”; “work in an unhealthy environ-

Convention has limited its scope, but achieved greater acceptance than the Minimum Age Convention No. 138.¹¹⁴

Unlike its predecessor, the Worst Forms of Child Labor Convention provides guidance on achieving its goals and mandates a proactive approach to the child labor problem.¹¹⁵ The Convention stresses the need to “reach out to children at special risk”¹¹⁶ and prevent children from engaging in the worst forms of child labor.¹¹⁷ With respect to children removed from work, the Convention emphasizes the importance of measures for “rehabilitation and social integration”¹¹⁸ and access to free basic education and vocational training.¹¹⁹ Thus, the Convention makes it clear that not only should children be protected from certain categories of work, children should also be protected from the need to work.

Empirical data supports this approach and shows that child labor abolition requires proactive measures that address the root causes of child labor. For example, the *bolsa escola* program in Brazil provides a monthly minimum salary to poor families whose children stay in school.¹²⁰ This eliminates the need for the children to join the workforce too early and prevents them from dropping out of school, which has made the program a success.¹²¹ Remedial and educational programs such as *bolsa escola* show that the solution to the child labor problem lies in “capacity building”¹²² measures—steps aimed at enhancing the economy, educational system, and civic participation in a community.¹²³

ment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health”; and “work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.” *Id.* art. 3.

114. Dennis, *supra* note 104, at 943.

115. Noguchi, *supra* note 104, at 360–61.

116. Worst Forms of Child Labor Convention, *supra* note 28, art. 7(2)(d).

117. *Id.* art. 7(2)(a).

118. *Id.* art. 7(2)(b).

119. *Id.* art. 7(2)(c).

120. ILC, *A Future Without Child Labor*, *supra* note 86, at 101.

121. *Id.*

122. WORLD VISION UK, *supra* note 36, at 10.

123. See SEN, *supra* note 59, 112–16 (examining the interrelation between markets, liberty, and labor); Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa*, 47 J. AFRICAN L. 1, 4 (2003) (discussing the role of development in fulfillment of human rights).

III. HUMAN RIGHTS OF ECONOMICALLY ACTIVE CHILDREN

The Convention on the Rights of the Child,¹²⁴ which memorializes¹²⁵ the principles of children's human rights, identifies two aspects of children's economic activities. On the one hand, children have the right to be free from exploitation and involvement in hazardous work,¹²⁶ as well as to enjoy rest and leisure.¹²⁷ On the other hand, children have the rights to survival¹²⁸ and an adequate standard of living,¹²⁹ which are implicated in situations where children work in order to support themselves and their families.

The interaction between these two aspects of children's economic activities can be illustrated by the public debate that surrounded the 1992 Child Labor Deterrence Act¹³⁰ proposed in the U.S. Congress. This bill sought to introduce sanctions with respect to imported products made with child labor¹³¹ and, thus, advance children's right to be free from exploitation. In response to this bill, Bangladeshi local activists asserted that dismissing children from the garment industry would mean throwing them into the streets without means of subsistence and effectively forcing

124. Convention on the Rights of the Child, *supra* note 29. The United States has not ratified this Convention. The United States has ratified the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex I, II, U.N. Doc. A/RES/54/263 (May 25, 2000). Office of the U.N. High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, June 9, 2004, <http://www.unhchr.ch/pdf/report.pdf>. The United States has expressed four areas of concern pertaining to the Convention, namely, sovereignty, federalism, reproductive rights, and parents' rights. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 168, 171-72 (2006). The Convention may establish principles of customary international law. Bullard, *supra* note 24.

125. Instruments preceding the Convention on the Rights of the Child include the Declaration of the Rights of the Child, which enumerates ten principles of children's rights. Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. GAOR, 14th Sess., 841st plen. mtg., U.N. Doc. A/4354 (Nov. 20, 1959).

126. The Convention on the Rights of the Child provides that States "recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." Convention on the Rights of the Child, *supra* note 29, art. 32.

127. *Id.* art. 31.

128. *Id.* art. 6(2).

129. *Id.* art. 27.

130. Child Labor Deterrence Act, S. 3133, 102nd Cong. (1992).

131. *Id.* § 5.

the children into more hazardous occupations,¹³² which would jeopardize the children's rights to survival and an adequate standard of living. In fact, between 1992 and 1995, Bangladeshi manufacturers dismissed tens of thousands of children who subsequently became rickshaw pullers, brick carriers, rag-pickers, and prostitutes.¹³³ Some 40,000 children dismissed from the factories were never seen again.¹³⁴ This example demonstrates that children's right to be free from exploitation and their right to survival should be balanced.

As the right to survival is a necessary condition for the enjoyment of other rights, one may suggest that the right to survival should trump other rights. But this logic fails in situations involving hazardous work, for example, deep sea fishing. In the Philippines, a country of seven thousand islands, children work in *pa-aling*, or deep sea fishing, where, carrying hoses attached to a surface air compressor, children dive approximately thirty to fifty feet without protective gear and chase fish into the nets.¹³⁵ This exposes children to ear injuries, shark attacks, and drowning.¹³⁶ The example of deep-sea fishing shows that the very economic opportunity that enables a child to earn a living and survive may, at the same time, expose the child to occupational hazards, and thus, threaten the child's survival. The difficulty in balancing the two rights may be paralyzing for the employer: regardless of whether the employer dismisses the child from work or allows the child to work, the employer would in effect take away the child's rights.

The "best interests" principle helps to resolve this tension. This principle, as codified in the Convention on the Rights of the Child, provides that, in all actions involving the child, the "best interests of the child shall be a primary consideration."¹³⁷ The drafters' use of the indefinite article in the term "a primary consideration" shows that the child's inter-

132. Shareen Hertel, *New Moves in Transnational Advocacy: Getting Labor and Economic Rights on the Agenda in Unexpected Ways*, 12 GLOBAL GOVERNANCE 263, 267–68 (2006).

133. SEABROOK, *supra* note 49, 64–65; WORLD VISION UK, *supra* note 36, at 7.

134. Hertel, *supra* note 132, at 270. *See also* WORLD VISION UK, *supra* note 36, at 7 (discussing the consequences of dismissing children from work).

135. U.S. DEP'T OF LABOR, *FACES OF CHANGE: HIGHLIGHTS OF U.S. DEPARTMENT OF LABOR EFFORTS TO COMBAT INTERNATIONAL CHILD LABOR* 6 (2003).

136. *Id.*

137. Convention on the Rights of the Child, *supra* note 29, art. 3(1). The "best interests" approach is the general principle of law common to many countries. Jacqueline Rubellin-Devichi, *The Best Interests Principle in French Law and Practice*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS*, *supra* note 44, at 259, 260.

ests are not an overriding factor,¹³⁸ but the choice of the word “consideration” (as opposed to “element” or “factor”) demonstrates that the child’s interests “must actually be considered.”¹³⁹ As such, this principle accommodates various ideological, social, and cultural approaches in a universal norm and demands the consideration of the child’s unique circumstances.¹⁴⁰

The concept of children’s participatory rights may aid in ascertaining such circumstances. The Convention on the Rights of the Child provides for a bundle of participatory rights, namely, the freedom of expression, conscience, and assembly.¹⁴¹ In essence, the concept of participatory rights or “participation” requires that, depending on the child’s maturity, the child should participate in decisions about his or her life¹⁴² and have the opportunity to be “present or consulted.”¹⁴³ As children have been “the most photographed and the least listened to members of society,”¹⁴⁴ the Convention’s codification of this broad range of participatory rights is a step forward in the fulfillment of children’s rights.¹⁴⁵

Participation empowers the child by including the child in the decision-making process concerning his or her life, which the following examples illustrate. A nongovernmental organization (“NGO”), Save the Children UK, which conducted evaluation missions in Honduras, Bangladesh, and Burkina Faso, engaged children in data collection and found that children-interviewers can be “particularly effective as children may relate to

138. Philip Alston, *The Best Interests Principle: Towards a Conciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS*, *supra* note 44, at 12, 12.

139. *Id.* at 13.

140. *Id.* at 16.

141. Convention on the Rights of the Child, *supra* note 29, art. 13–15 (establishing the freedom of expression; freedom of thought, conscience, and religion; freedom of association and peaceful assembly, respectively). See Rutkow & Lozman, *supra* note 124, at 165 (discussing children’s participatory rights codified in the Convention).

142. Convention on the Rights of the Child, *supra* note 29, art. 12 (providing for the right of the child “who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”).

143. Anita Franklin & Patricia Sloper, *Listening and Responding? Children’s Participation in Health Care Within England*, in *CHILDREN’S HEALTH AND CHILDREN’S RIGHTS*, 11, 14 (Michael Freeman ed., 2006).

144. ROGER A. HART, *CHILDREN’S PARTICIPATION: FROM TOKENISM TO CITIZENSHIP* 9 (1992).

145. Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Landmark*, 3 *WM. & MARY J. WOMEN & L.* 29, 49–50 (1997).

each other in a more open way.”¹⁴⁶ Another NGO, Undugu Society, organized group meetings for street children in Mathare Valley, a slum in Nairobi, Kenya, who supported themselves by collecting plastic, scrap metal, and paper bags around the city.¹⁴⁷ In the course of these meetings, children learned how to read a weighing scale and calculate the price of what they were selling in order to avoid being cheated by the street buyers.¹⁴⁸ The children ultimately decided to sell scrap metal directly to the factory where the price would be fixed, making cheating less likely.¹⁴⁹ These examples demonstrate that working children find ways to subsist in a dangerous world on a daily basis, and therefore, they can help in identifying realistic solutions to the child labor problem.

IV. CHILD LABOR STANDARDS IN FREE TRADE AGREEMENTS

In addition to the ILO conventions and the Convention on the Rights of the Child, several U.S. FTAs set forth child labor standards. Generally, parties entering into an FTA agree to eliminate tariffs and other barriers to trade in goods among themselves, facilitating easier access to each other's markets.¹⁵⁰ This integration of regional trade regimes may reveal inequalities in labor conditions in such regimes, which some FTAs address by imposing labor standards, also referred to as “social clauses.”¹⁵¹ Alternatively, signatories to an FTA may choose to enter into a side agreement with respect to labor standards, such as the North American Agreement on Labor Cooperation (“NAALC”).¹⁵² NAALC was the first labor accord to supplement an FTA,¹⁵³ namely, the 1992 North American Free Trade Agreement between Canada, Mexico, and the United States (“NAFTA”).¹⁵⁴

146. SAVE THE CHILDREN, FINDING THE RIGHT TOOLS FOR THE JOB: LESSONS LEARNED ON THE APPLICATION OF THE ILO CONVENTION 182 ON THE WORST FORMS OF CHILD LABOUR, at i, 7 (2003).

147. HART, *supra* note 144, at 25.

148. *Id.*

149. *Id.*

150. WILLIAM H. COOPER, FREE TRADE AGREEMENTS: IMPACT ON U.S. TRADE AND IMPLICATIONS FOR U.S. TRADE POLICY 2–5 (2004).

151. TSOGAS, *supra* note 63, at 19–20. *See also* Doumbia-Henry & Gravel, *supra* note 72, at 186, 189 (discussing enforcement of labor standards through trade agreements).

152. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 13, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

153. LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 121 (2d ed. 1994).

154. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057.

The inclusion of labor standards in FTAs opens the possibility of using trade sanctions as a mechanism for enforcing these standards¹⁵⁵—an avenue unavailable under the ILO conventions. Under the ILO Constitution, the ILO may recommend “such action as it may deem wise and expedient to secure compliance,”¹⁵⁶ but the ILO has never imposed and, under the current version of the ILO Constitution,¹⁵⁷ does not have express authority to impose, economic sanctions.¹⁵⁸ Currently, the United States is a party to over a dozen bilateral and regional FTAs.¹⁵⁹ These FTAs differ in their approaches to the use of trade sanctions in enforcing child labor standards, as NAALC, the 2000 U.S.-Jordan FTA,¹⁶⁰ and the 2004 Central American-Dominican Republic-U.S. FTA¹⁶¹ (“CAFTA-DR”) illustrate.

A. NAALC: The First Labor Accord to Accompany an FTA

NAALC was intended to address the concern of U.S. labor unions about the potential accelerated migration of U.S. jobs to Mexico, where the relatively high existing labor standards were inadequately enforced.¹⁶² This accord, however, does not establish new standards, and its

155. See Andrew T. Guzman, *Trade Labor, Legitimacy*, 91 CAL. L. REV. 885, 886–87 (2003) (observing that “trade sanctions may be the only effective way of establishing core labor standards”).

156. Constitution of the International Labour Organisation, *supra* note 81, art. 33.

157. The first ILO Constitution contained a clause providing for economic enforcement measures. This clause was never used and in 1946 it was deleted. Steve Charnovitz, *The Influence of International Labor Standards on the World Trading Regime: A Historical Overview*, 126 INT’L LAB. REV. 565, 575–76 (1987).

158. Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements: U.S. Experience*, 19 COMP. LAB. L. & POL’Y J. 145, 149–51 (1998).

159. Office of the U.S. Trade Representative, http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Oct. 5, 2008) (listing U.S. FTAs currently in force).

160. Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 115 Stat. 243 [hereinafter U.S.-Jordan FTA].

161. Central American-Dominican Republic-United States Free Trade Agreement, May 28, 2004, 119 Stat. 462 [hereinafter CAFTA-DR].

162. Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS L. REV. 917, 919–21 (1994); Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 67 (1994); Stanley M. Spracker & Gregory M. Brown, *Labor Issues Under the NAFTA: Options and Resolutions*, in THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 351, 352–54, 365 (Judith H. Bello et al. eds., 1994).

effect in terms of improvement in the labor conditions has been limited.¹⁶³

NAALC neither incorporates international child labor standards nor introduces minimum standards for the signatories' domestic laws.¹⁶⁴ Instead, the accord affirms the parties' rights to establish their own labor laws¹⁶⁵; each party has to "ensure" that such laws provide for "high standards" and "strive to improve" them.¹⁶⁶ NAALC identifies eleven "guiding principles"¹⁶⁷ that the signatories agree to promote, including "labor protections for children and young persons."¹⁶⁸ This principle requires "the establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements."¹⁶⁹ Neither in this pronouncement nor elsewhere in the agreement does NAALC set child labor abolition as a goal or specify the minimum age for employment of children.¹⁷⁰

The enforcement mechanisms for these relatively weak standards are toothless.¹⁷¹ NAALC expressly denies any party's rights to "undertake law enforcement activities" on another party's territory¹⁷² and any right to private actions in domestic legal systems.¹⁷³ The NAALC signatories agree to advance the guiding principles through collaboration, cooperation, and information exchange.¹⁷⁴ For these purposes, NAALC creates several procedures and bodies for dispute resolution through consultations and arbitration,¹⁷⁵ including the Commission for Labor Cooperation.¹⁷⁶ Under these procedures, however, it may take a dispute over three

163. Hagen, *supra* note 162, at 925; Thomas J. Manley & Ambassador Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 EMORY INT'L L. REV. 85, 104, 111, 113 (2004).

164. See NAALC, *supra* note 152; Hagen, *supra* note 162, at 925; Manley & Lauredo, *supra* note 163, at 104; Smith, *supra* note 162, at 79, 86.

165. NAALC, *supra* note 152, art. 2.

166. *Id.*

167. *Id.* annex 1, pmb1.

168. *Id.* annex 1, para. 5.

169. *Id.*

170. See NAALC, *supra* note 152.

171. Hagen, *supra* note 162, at 927–30; Manley & Lauredo, *supra* note 163, at 105; Spracker & Brown, *supra* note 162, at 365–66.

172. NAALC, *supra* note 152, art. 42.

173. *Id.* art. 43.

174. GLICK, *supra* note 153, at 121.

175. NAALC, *supra* note 152, arts. 27–41.

176. *Id.* art. 8.

years to reach the stage where sanctions may be considered,¹⁷⁷ and even in that case, remedies in the form of monetary penalties and suspension of trade benefits under NAFTA are limited to “persistent patterns” of non-enforcement.¹⁷⁸

Meanwhile, child labor in Mexico continues to be a problem.¹⁷⁹ Between 1999 and 2005, sixteen percent of children ages five to fourteen in Mexico were engaged in child labor.¹⁸⁰ The majority of these children worked for small companies, in agriculture and construction, where labor enforcement is inadequate.¹⁸¹ A recent incident involving nine-year-old David Salgado Aranda, as reported by the U.N. Children’s Fund, supports this contention.¹⁸² David migrated with his parents to Sinaloa, northern Mexico, looking for seasonal work, similar to some 300,000 other migrant workers’ children ages six and older.¹⁸³ While David was working picking tomatoes, he was run over by a tractor and killed.¹⁸⁴ David was too young to have been working on a commercial plantation. As these reports and statistics illustrate, NAALC did not have the anticipated positive effect on labor conditions in Mexico.¹⁸⁵ This instrument, however, raised the issue of the protection of working children, which was a step toward solving the child labor problem.

B. The High Watermark of Child Labor Standards: The U.S.-Jordan FTA

The subsequently concluded U.S.-Jordan FTA provides more stringent labor protections than NAALC. The U.S.-Jordan FTA reaffirms the signatories’ obligations as ILO members,¹⁸⁶ incorporates internationally recognized minimum age standards,¹⁸⁷ and contains a “no relaxation

177. GLICK, *supra* note 153, at 130; Spracker & Brown, *supra* note 162, at 372.

178. NAALC, *supra* note 152, arts. 27(1), 39, 49; Spracker & Brown, *supra* note 162, at 370–72.

179. See BACON, *supra* note 42, at 16, 40–41 (discussing the problem of child labor in Mexico).

180. U.N. CHILDREN’S FUND, THE STATE OF THE WORLD’S CHILDREN 134 (2006).

181. U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, MEXICO (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78898.htm>.

182. Thomas Nybo, *Child Migrant Workers in Mexico Miss out on Education and a Safe Environment*, UNICEF, Mar. 2, 2007, http://www.unicef.org/infobycountry/mexico_38520.html.

183. *Id.*

184. *Id.*

185. Hagen, *supra* note 162, at 918–20; Don Wells, “Best Practice” in the Regulation of International Labor Standards: Lessons of the U.S.-Cambodia Textile Agreement, 27 COMP. LAB. L. & POL’Y J. 357, 358 (2006).

186. U.S.-Jordan FTA, *supra* note 160, art. 6(1).

187. *Id.* art. 6(6)(d).

clause,” under which the parties may not weaken existing domestic labor standards.¹⁸⁸ The agreement enforces compliance with labor provisions through trade sanctions.¹⁸⁹ Due to its high standards and direct enforcement through trade sanctions, the U.S.-Jordan FTA has been characterized as the high watermark in FTA labor protections.¹⁹⁰ The U.N. Committee on the Rights of the Child has praised the measures for eliminating child labor in Jordan, including the enhancement of domestic child labor laws in Jordan and establishment of a national database on child labor.¹⁹¹ This FTA indicates that where the ILO, lacking the ability to impose economic sanctions, fails to enforce international labor standards, trade agreements could potentially take on this role.¹⁹²

C. CAFTA-DR as a “Missed Opportunity”¹⁹³ to Improve Labor Conditions

CAFTA-DR stands out among U.S. FTAs because it has created the second-largest free trade area for U.S. exports in Latin America.¹⁹⁴ In terms of labor protections, CAFTA-DR is similar to NAALC in that it only addresses the parties’ enforcement of their own “labor laws,”¹⁹⁵ which CAFTA-DR defines to include the parties’ laws “directly related” to the international minimum age requirements and the elimination of the worst forms of child labor.¹⁹⁶ CAFTA-DR subjects labor claims to dispute resolution procedures separate from those for commercial disputes¹⁹⁷

188. *Id.* art. 6(2).

189. *Id.* art. 10.

190. Doumbia-Henry & Gravel, *supra* note 72, at 192; Manley & Lauredo, *supra* note 163, at 105–06; Marisa Anne Pagnattaro, *Leveling the Playing Field: Labor Provisions in CAFTA*, 29 FORDHAM INT’L L.J. 386, 440–42 (2006).

191. U.N. Comm. on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention*, paras. 6–7, 88–89, 43d Sess., U.N. Doc. CRC/C/JOR/CO/3 (Sept. 29, 2006).

192. *See supra* note 155 and accompanying text.

193. H.R. REP. NO. 109-182, at 46 (2005).

194. Pagnattaro, *supra* note 190, at 386.

195. CAFTA-DR, *supra* note 161, art. 16.2(1)(a).

196. *Id.* art. 16.8. Each signatory promises to “strive to ensure” that it does not derogate from its labor laws in a way that “reduces adherence” to the international standards referenced in the FTA, but each party retains discretion over “investigatory, prosecutorial, regulatory and compliance matters.” *Id.* arts. 16.2(1)(b), 16.2(2).

197. Under CAFTA-DR, an aggrieved party has to first seek consultations with another party and, if that fails, escalate the issue to the Labor Affairs Council—a body “comprising cabinet-level or equivalent representatives” of the signatories (or their designees), and overseeing labor matters under CAFTA-DR. CAFTA-DR, *supra* note 161, arts. 16.4, 16.6(1), 16.6(4), 16.6(8). CAFTA-DR establishes a Labor Cooperation and Capacity Building Mechanism to advance capacity building activities in the area of labor stan-

and does not authorize trade sanctions for labor violations.¹⁹⁸ Instead, CAFTA-DR contains a provision for “monetary assessment” payable to a fund that CAFTA-DR creates,¹⁹⁹ which means that such assessment is not payable to the aggrieved party.²⁰⁰ Additionally, CAFTA-DR caps such monetary assessment at fifteen million U.S. dollars per year.²⁰¹ For its failure to establish and strictly enforce labor standards, this FTA has been criticized in the United States as inadequate.²⁰²

A representative of the National Labor Committee, a U.S. NGO whose mission is to help “defend the human rights of workers in the global economy,”²⁰³ recently visited the Legumex factory in Guatemala, a signatory to CAFTA-DR.²⁰⁴ The Legumex factory processes fruits and vegetables for export to the United States.²⁰⁵ Through reports of the National Labor Committee, the international community learned that at the factory, thirteen-year-old children were working twelve-hour shifts, wearing only t-shirts in an area surrounded by food freezers.²⁰⁶ A child worker cutting vegetables for the U.S. consumer has to cut every head of broccoli into ninety-seven pieces in sixty-four seconds, thus, making one cut every seven-tenths of a second throughout the shift.²⁰⁷ For the duration of their twelve-hour shifts, children cutting watermelons stand in an inch of watermelon juice dripping from the cutting tables, children’s wrists swollen and their feet cracked and bleeding.²⁰⁸ These findings support the contention that CAFTA-DR was “a missed opportunity”²⁰⁹ in improving labor conditions in CAFTA-DR countries.

dards, but the lack of funding of this mechanism has undermined its significance. Pagnattaro, *supra* note 190, at 432.

198. See CAFTA-DR, *supra* note 161, ch. 16; Pagnattaro, *supra* note 190, at 432.

199. CAFTA-DR, *supra* note 161, art. 20.17(4).

200. *Id.*

201. *Id.* art. 20.17(2).

202. Kolben, *supra* note 71, at 203–04; Pagnattaro, *supra* note 190, at 432.

203. The National Labor Committee “investigates and exposes human and labor rights abuses committed by U.S. companies producing goods in the developing world.” The National Labor Committee, Mission Statement, <http://www.nlcnet.org/aboutus.php> (last visited Oct. 15, 2008).

204. PBC Films, *Harvest of Shame: Report Accuses Child Labor Abuses in Guatemala*, Mar. 13, 2007, http://www.pbcfilms.com/Harvest_of_Shame.php.

205. *Id.*

206. The National Labor Committee reports that the employer did not allow children to wear sweaters because of the fear that lint from the sweaters could get onto the products. *Id.*

207. *Id.*

208. *Id.*

209. H.R. REP. NO. 109-182, at 46.

To conclude, U.S. FTAs that contain provisions concerning working children generally do not set new child labor standards. These agreements, however, encourage the signatories to comply with existing standards and raise awareness regarding child labor issues. Some FTAs also enforce child labor standards through trade sanctions.

V. CORPORATE COMPLIANCE WITH INTERNATIONAL CHILD LABOR STANDARDS

As international child labor standards are evolving, TNCs seeking to manage their litigation and reputational risks should incorporate these standards into their compliance programs. The purpose of a compliance program is to ensure that individual and collective behavior within the corporation follows applicable laws.²¹⁰ In a compliance program, the focus is on development of specific business processes and internal mechanisms that proactively prevent and avoid violations of law.²¹¹

Compliance programs should be distinguished from codes of conduct and other ethical business initiatives. Numerous TNCs, including Bridgestone Corporation²¹² and Gap Inc.,²¹³ have adopted codes of conduct—“statements of company policy”²¹⁴ announcing the company’s commitment to ethical business conduct.²¹⁵ Similarly to codes of conduct, various “labeling” initiatives certify manufacturers and producers that comply with child labor standards. For example, the international NGO RugMark Foundation certifies child-labor compliant carpet manufacturers in South Asia.²¹⁶ These ethical business initiatives contribute to the goal of child labor abolition, but differ from compliance programs in that ethical business initiatives are voluntary and primarily designed as a marketing

210. JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE 56, 104 (1988).

211. *Id.* at 47–48, 79–81, 104.

212. Bridgestone Americas Holding, Inc., Mission, Vision and Values, http://www.bridgestone-firestone.com/about_index.asp?id=about/mvv (last visited Oct. 15, 2008).

213. GAP INC., CODE OF BUSINESS CONDUCT (2005), available at http://www.gapinc.com/public/documents/Code_English.pdf; Gap Inc., Code of Vendor Conduct, http://www.gapinc.com/public/documents/code_vendor_conduct.pdf (last visited Oct. 15, 2008).

214. U.S. DEP'T OF LABOR, THE APPAREL INDUSTRY AND CODES OF CONDUCT: A SOLUTION TO THE INTERNATIONAL CHILD LABOR PROBLEM?, at i (1996).

215. See Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 674–85 (1995) (examining the codes of conduct of Levi Strauss & Co., Reebok Corp., and Starbucks Coffee Co.).

216. RugMark Foundation, <http://www.rugmark.org> (last visited Oct. 15, 2008).

tool.²¹⁷ In contrast, compliance programs focus on internal policies and procedures guiding TNCs' employees and suppliers and reflecting specific legal standards.

To create a compliance program, TNCs first need to identify the applicable child labor standards and establish measures implementing these standards in TNCs' practices and supplier reviews. As the Gap Inc. incident demonstrates,²¹⁸ TNCs also need to develop procedures governing their response to child labor incidents.

A. Identifying and Implementing Applicable Standards

As the analysis of treaties and conventions pertaining to child labor shows, three categories of child labor violate international law²¹⁹: the unconditional worst forms of child labor,²²⁰ "hazardous work,"²²¹ and employment of children under a minimum age (which may be set between fifteen and twelve, depending on the States' international obligations and domestic regulation).²²² Based on the definitions of these categories, the bonded child labor allegedly involved in the Gap Inc. incident should fall under the realm of the unconditional worst forms of child labor. The engagement of children in the application of pesticides and fertilizers without protective equipment, as alleged in *Bridgestone*,²²³ may violate international law as a practice exposing children to hazardous substances. This shows that despite the fact that international child labor standards set the outer limits of permissible labor practices involving youth, TNCs may confront situations where the international standards are violated.

To comply with these standards, TNCs should implement more stringent screening and monitoring measures. The initial supplier screening should extend beyond the inspection of the suppliers' records and premises. Record review or a single visit to the supplier's factory would not reveal, for instance, that children at the factory use their relatives' employee numbers to appear on the books as adult workers or that the sup-

217. See TSOOGAS, *supra* note 63, at 11 ("[T]he 'ethical consumer,' sensitized to human rights and environmental issues, sees shopping as a complement to (or substitute for) other forms of direct social activity.").

218. McDougall, *supra* note 13.

219. ILC, *A Future Without Child Labor*, *supra* note 86, at 9.

220. Worst Forms of Child Labor Convention, *supra* note 28, art. 3.

221. *Id.* art. 3(d); Minimum Age Convention, *supra* note 84, art. 3; ILO Worst Forms of Child Labour Recommendation (No. 190), *supra* note 110; ILO Minimum Age Recommendation (No. 146), *supra* note 95.

222. Minimum Age Convention, *supra* note 84, arts. 2(3), 4(2), 5(1), 7. See also ILC, *A Future Without Child Labor*, *supra* note 86, at 9–10.

223. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

plier may keep a second set of records, which easily “bamboozle”²²⁴ TNCs. To avoid this, TNCs can use accounting and social monitoring firms experienced in evaluating supply-chain risk and compliance with child labor standards.²²⁵ The contract with the supplier should address this concern and include the supplier’s on-going certification of compliance with international and local child labor laws²²⁶ and a provision giving TNCs’ representatives, such as social monitoring firms, the right to inspect the supplier’s premises and records at any time without prior notice to the supplier.

TNCs or their representatives should conduct follow-up visits to the supplier’s factory. To that end, TNCs should maintain a current list of all production sites of its suppliers. For instance, the policy of IKEA, an international furniture and home products franchise,²²⁷ requires suppliers to disclose the locations of all production sites.²²⁸ This policy should extend to the suppliers’ subcontractors as well. In order to ensure the accuracy of information on child labor compliance that the suppliers provide to the TNCs’ headquarters, TNCs may engage local unions in the monitoring process.²²⁹ TNCs may arrange training sessions for the suppliers’ workers to increase their awareness with respect to child labor issues. To improve incident reporting, TNCs may establish a hotline or other anonymous reporting system, such as an independent worker survey.²³⁰ These measures will ensure that the TNC’s management is aware of the TNC’s and its suppliers’ labor practices and can timely respond to any potential violations.

224. Robyn Blumner, *New Standards for Trade Agreements May Not Change Much*, SALT LAKE TRIB., May 26, 2007, available at <http://www.nlcnet.org/article.php?id=324>.

225. See, e.g., Cal Safety Compliance Corporation, <http://www.cscconline.com> (last visited Nov. 10, 2008) (providing that “CSCC is dedicated to helping our clients build secure and socially responsible relationships with their supply chain partners”).

226. See HUMAN RIGHTS WATCH, *SMALL CHANGE: BONDED CHILD LABOR IN INDIA’S SILK INDUSTRY* (2003), <http://www.hrw.org/reports/2003/india/> (providing recommendations to the international community with respect to child labor policies).

227. Inter IKEA Systems B.V., <http://franchisor.ikea.com> (last visited Oct. 23, 2008).

228. IKEA SERVICES AB, *IKEA’S POSITION ON CHILD LABOR* (2003), 1, http://www.ikea.com/ms/en_AU/about_ikea_new/about/read_our_materials/ikea_position_child_labour.pdf (“The supplier must agree to provide lists of all places of production.”).

229. See Risa L. Lieberwitz, *Linking Trade and Labor Standards: Prioritizing the Right of Association*, 39 CORNELL INT’L L.J. 641, 648–49 (2006) (discussing the role of unions in promoting labor rights).

230. See, e.g., Gap Inc., *Code Hotline*, http://www.gapinc.com/public/Investors/inv_compliance_hotline.shtml (last visited Oct. 15, 2008) (describing a hotline dedicated to reports of violations of the Code of Business Conduct).

B. Responding to Child Labor Incidents

When a TNC discovers child labor incidents in its own or its suppliers' labor practices, the TNC's remedial and follow-up measures should take into consideration children's rights, such as the right to be free from exploitation²³¹ and the right to survival and an adequate standard of living.²³² To balance these rights, the TNC should engage the affected children in a discussion about possible solutions to the problem²³³ and assure that the best interests of the child are given a primary consideration.²³⁴ Following this approach, TNCs may find that an instant severing of ties with a non-compliant supplier or immediate dismissal of children from the workplace without creation of any alternatives to work may not, on balance, benefit the children.

While under certain circumstances, withdrawal and dismissal may be a justified measure, it may not constitute a sound policy if applied alone and without a case-by-case determination. Admittedly, withdrawal from a relationship with a noncompliant supplier or removal of children from work may be perceived as mitigating the TNC's potential liability and deterring future noncompliance on the part of other suppliers. According to Gap Inc., for example, in 2006, it severed ties with twenty-three non-compliant factories.²³⁵ TNCs, however, are increasingly recognizing the limitations of this approach.

The solution to the child labor problem should take into consideration the best interests of the child and focus on creating meaningful alternatives for children dismissed from work. The apparel and accessories retailer H&M Hennes & Mauritz AB ("H&M"),²³⁶ for instance, reports that when it discovers "underage workers" at its supplier's site, H&M, in cooperation with the supplier, contacts the family of the affected child and seeks a solution in the child's best interests.²³⁷ One such solution has been allowing the child to continue education and paying wages to the child's family during the study period until the child reaches the appro-

231. Convention on the Rights of the Child, *supra* note 29, art. 19.

232. *Id.* art. 6(2).

233. See *supra* note 141 and accompanying text.

234. See *supra* note 142 and accompanying text.

235. Press Release, Gap Inc., *supra* note 14.

236. H&M, About H&M, http://www.hm.com/us/abouthm__aboutm.nhtml (last visited Oct. 23, 2008).

237. H&M, Supply Chain Monitoring, What Do We Do If We Find Child Labor Being Used?, http://www.hm.com/us/corporateresponsibility/supplychainworkingconditions/supplychainmonitoring/whatwedoidfweediscoverchildlabour__monotoringarticle4.nhtml (last visited Oct. 23, 2008).

priate age.²³⁸ Similarly, to address the child labor issue at its suppliers' plants, Levi Strauss & Co., a multinational apparel company,²³⁹ made a decision to pay for the children's education and school supplies until they reach a minimum age when they would be offered a job at the plant.²⁴⁰ These capacity-building measures, providing resources and creating opportunities for the implementation of child labor standards in the local communities,²⁴¹ serve the goals of child labor abolition more effectively than mere dismissal of child laborers from work.

Development of capacity-building measures presents a fertile ground for creative solutions. In rural areas in developing countries, for instance, children often have to walk long distances to get to school,²⁴² and simply providing basic transportation may increase the chances that these children will continue attending school, as opposed to joining the workforce too early. In identifying these solutions, TNCs may partner up with NGOs that have experience in capacity building. Starbucks Corporation, an international coffee retailer and coffee-house chain,²⁴³ for example, partnered with Save the Children USA, an international relief and development organization, in bringing bilingual education to Mayan communities in Guatemala,²⁴⁴ which will expand the employment prospects for children in these communities.

Although these measures increase the TNCs' immediate cost of doing business, such cost is unlikely to be prohibitive. Generally, compliance programs incur costs, but are necessary for the business in order to avoid litigation, regulatory, and reputational risks. Additionally, by operating or otherwise doing business in jurisdictions with cheaper labor (where incidents of child labor are more likely) TNCs already reduce their labor costs and reap other benefits of globalization, a process that "has generated vast fortunes" for TNCs.²⁴⁵ The cost-benefit analysis of the measures addressing the child labor problem should take into account this relative reduction in overall costs, as well as other factors related to economic disparities between developed and developing countries such as the relative cost of living. The National Labor Committee estimates that an extra payment of twenty-five cents per garment paid by U.S. retailers to Ban-

238. *Id.*

239. Levi Strauss & Co., <http://www.levistrauss.com> (last visited Oct. 23, 2008).

240. Compa & Hinchliffe-Darricarrère, *supra* note 215, at 679.

241. WORLD VISION UK, *supra* note 36, at 10.

242. ILO, *World Day Against Child Labour*, *supra* note 30.

243. Starbucks Corporation, <http://www.starbucks.com> (last visited Oct. 23, 2008).

244. STARBUCKS CORPORATION, BEYOND THE CUP: CORPORATE SOCIAL RESPONSIBILITY FISCAL 2005 ANNUAL REPORT 6, 40 (2005).

245. Hiatt & Greenfield, *supra* note 71, at 40–41.

gladeshi vendors would provide the Bangladeshi economy with assistance eight times exceeding the current U.S. aid,²⁴⁶ and thus, create new economic opportunities. In return, capacity-building measures will have a positive long-term effect on these communities, which will benefit the TNCs by developing the future workforce.

CONCLUSION

TNCs are increasingly becoming aware of the litigation and reputational risks posed by the use of child labor in TNCs' and their suppliers' international operations. There are hardly any "quick fixes"²⁴⁷ in this area because child labor issues are rooted in social and economic problems such as the lack of resources and opportunities. In developing countries, children have to work to support themselves and their families, and thus, child labor is a problem of development rather than merely an issue of corporate misfeasance. This understanding is important for instilling the need for TNCs to take measures that anticipate and address potential child labor incidents. Using the guidance provided in treaties pertaining to working youth, TNCs should approach child labor proactively, resist distancing themselves from this problem, and embrace the opportunity to create meaningful alternatives for child laborers.

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246. National Labor Committee, <http://www.nlcnet.org> (last visited Oct. 15, 2008).

247. ACTION AGAINST CHILD LABOR 224 (Nelien Haspels & Michele Jankanish eds., 2000).

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